STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN SECOND INJURY FUND,

Plaintiff-Appellant,

v

TOYOTA ENGINEERING & MANUFACTURING NORTH AMERICA INC,

Defendant-Appellee.

UNPUBLISHED
May 12, 2009

No. 286616
Ingham Circuit Court
LC No. 08-000466-CZ

Before: Zahra, P.J., and O'Connell, and K.F. Kelly, JJ.

PER CURIAM.

Plaintiff Michigan Second Injury Fund ("the Fund") appeals as of right an order granting defendant summary disposition. We affirm.

I. Basic Facts and Proceedings

This case has been subject to protracted litigation. In 1983, while working for Braun Engineering, Larry Olsen sustained a serious back injury. Before he was employed by defendant Toyota Engineering and Manufacturing North America Inc ("Toyota") in 1990, he obtained a vocationally handicapped worker's certificate through a program administered by the Michigan Department of Education. See MCL 418.901, *et seq*. The certificate program improves a handicapped worker's chances of finding employment by limiting a subsequent employer's workers' compensation liability. Potential future benefits are coordinated with the Fund.

Olsen began work at Toyota as a senior maintenance technician. While lifting a heavy sump pump in 1993, plaintiff re-injured his back. He continued to work until 1995, when surgery to alleviate his back pain failed. The failed surgery left him unable to work and almost completely disabled. Pursuant to MCL 418.921 in the Workers' Disability Compensation Act ("WDCA"), Olsen received workers' compensation benefits for one year from Toyota and afterward from the Fund.

In October 1996, Olsen filed a complaint against Toyota under the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101. He alleged that Toyota had failed to accommodate his disability, which led to his on-the-job injuries. Toyota initially moved for summary disposition, arguing the Olsen's claims were barred by the exclusive remedy provision

of the WDCA, MCL 418.131. The lower court denied Toyota's motion for summary disposition. This Court granted leave to appeal. *Olsen v Toyota Technical Center USA Inc*, unpublished order of the Court of Appeals, issued September 23, 1997 (Docket. No 205031). This Court affirmed the lower court's decision denying Toyota summary disposition. See *Olsen v Toyota Technical Center USA Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 25, 1999 (Docket No. 205031) ("*Olsen I*"). On remand, the jury found in favor of Olsen and awarded him $360,000 for lost wages, $800,000 for lost future wages and $5,000,000 for emotional distress. The lower court reduced the award for lost and future wages to set off for workers' compensation benefits. Toyota appealed, and this Court affirmed the jury verdict in favor of plaintiff. *Olsen v Toyota Technical Center USA Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2002 (Docket No. 229543) ("*Olsen II*").

The Fund then filed a petition under the WDCA against Toyota seeking indemnity for workers' compensation payments the Fund made to Olsen. On August 15, 2005, a magistrate of the Workers' Compensation Board of Magistrates denied the Fund's request. The magistrate concluded that it lacked authority to grant indemnity. The Workers' Compensation Appellate Commission affirmed. The Fund applied for leave to appeal with this Court, which was granted. *Olsen v Toyota Technical Center USA Inc*, unpublished order of the Court of Appeals, issued September 1, 2006 (Docket. No 269208). This Court addressed whether under the WDCA Toyota must indemnify the Fund for the benefits the Fund has paid and will pay to Olsen. *Olsen v Toyota Technical Center USA Inc*, unpublished opinion of the Court of Appeals, issued September 13, 2007 (Docket No. 269208) ("*Olsen III*"). In *Olsen III*, this Court held that the magistrate and the WCAC do "not have the power to grant equitable relief." *Id*. citing *Lulgjuraj v Chrysler Corp*, 185 Mich App 539; 544-545; 463 NW2d 152 (1990); *Fuchs v General Motors Corp*, 118 Mich App 547, 553; 325 NW2d 489 (1982). This decision was not appealed to the Supreme Court.

On April 3, 2008, the Fund filed the instant complaint in circuit court again requesting that Toyota indemnify the Fund for the amount the Fund has and will pay to Olsen, $439,029.16 plus interest.

On May 5, 2008, Toyota moved for summary disposition, arguing that *Olsen III, supra* barred the Fund's indemnification claim on the basis of res judicata and collateral estoppel. The Fund responded asserting that *Olsen III, supra* was not decided on the merits. The circuit court agreed with the Fund that the doctrines of res judicata and collateral estoppel did not apply, but nonetheless held that the WDCA had exclusive jurisdiction, and that the circuit court therefore lacked subject matter jurisdiction.

II. Standard of Review

Toyota moved for summary disposition pursuant to MCR 2.116(C)(4), (6) and (8). We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court reviews de novo jurisdictional questions under MCR 2.116(C)(4) to "determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction." *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 356; 733 NW2d 107 (2007) (citation omitted); *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000).

III. Subject Matter Jurisdiction

We conclude that the circuit court correctly determined that it lacked subject matter jurisdiction to determine the Fund's indemnity claim against Toyota.

MCL 418.841 provides that:

> Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable. The director may be an interested party in all worker's compensation cases in questions of law.

On appeal, the Fund recognizes that MCL 418.841 "may initially appear to buttress the trial court's conclusion." The Fund, however, does not further address whether the language in MCL 418.841 precludes the Fund from seeking indemnity from Toyota. Rather, the Fund relies on case law and argues that, regardless of the language in MCL 418.841, the Fund is entitled to common law indemnity.

We conclude that the circuit court properly found that the Fund's indemnity claim relates to a "dispute or controversy concerning compensation" under the WDCA, and must be submitted to the Worker's Compensation Bureau (now Agency). Compensate is commonly defined as "to recompense for something; pay." Randon Webster's College Dictionary, 2nd. The legal definition of compensation is, "[i]ndemnification; payment of damages, making amends; making whole; giving an equivalent or substitute of equal value." Black's Law Dictionary, 6th. The Fund filed an indemnity action against Toyota for payments the Fund made to Olsen pursuant to the WDCA. Clearly, the instant action relates to a dispute or compensation that arose under the WDCA.

We also agree with the circuit court that the WDCA cannot be expanded "beyond its express terms," and thus is not susceptible to an "enlargement of principles in equity or common law adaptation." The WDCA expressly allows the Fund to seek reimbursement from third parties in certain instances. Specifically, in 1984, the Legislature added MCL 418.531(3) to permit the Fund to seek reimbursement from third parties through MCL 418.827. Yet, MCL 418.827 specifically states that, "[w]here the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person *other than a natural person in the same employ or the employer* to pay damages in respect thereof." (Emphasis added). Here, Toyota is the Olsen's employer and the provision that allows third-party suits expressly excludes any suit against Toyota. Had the Legislature intended to allow the Fund to seek reimbursement from employers whose negligence causes their employees harm, the Legislature could readily have included an express provision allowing the Fund to seek reimbursement. The omission of a provision in one part of a statute that is included in another part should be construed as intentional. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993); *Polkton Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005). Provisions not included by the Legislature should not be included by the courts. *Polkton Twp, supra* at 103. Thus, this claim involves a dispute over compensation that *shall* be submitted to the Worker's Compensation Agency. MCL 418.841.

The Fund primarily relies on *Dale v Whiteman*, 388 Mich 698; 202 NW2d 797 (1972), in which our Supreme Court considered whether the WDCA barred an indemnification claim against an employer. In *Dale*, the defendant took his car to a carwash owned by Carl Goldfarb. While driving the defendant's car to a drying area, an employee of the carwash struck the plaintiff, another employee of the car wash. The plaintiff filed suit against the defendant under the owner's liability statute. The defendant filed a third-party action against Goldfarb (the employer) for indemnification. Goldfarb then filed a cross-complaint seeking reimbursement for worker's compensation benefits paid to the plaintiff. The plaintiff recovered $100,000.00 in damages, and the defendant was granted $100,000.00 indemnification against Goldfarb, who received a no-cause of action verdict on his cross-complaint. On appeal to this Court, the awards were reduced by the amount of worker's compensation benefits paid by Goldfarb.

In the Supreme Court, the employer, Goldfarb, contended that the exclusive remedy provision of the worker's disability compensation act barred the defendant's claim for indemnification.[1] The Supreme Court noted that it was clear that the defendant was liable to the plaintiff under the owner's liability statute, but that it was also clear that the defendant was without fault. The issue then was "whether an obligation to reimburse can be implied by equitable principles in the face of the sweeping language of the workmen's compensation law." *Dale, supra* at 704. Our Supreme Court concluded that the exclusive remedy provision "is intended to be a bar only to any action against an employer by the employee or one which is derivative from his claim." *Id*. at 708. Consequently, Goldfarb's claim was found to be without merit, and the defendant's indemnification award against the employer was affirmed.

We conclude *Dale* is distinguishable from the instant case. The litigant seeking indemnity in *Dale* (the defendant) was not subject to the WDCA and thus did not seek "compensation or other benefits" under the WDCA. By contrast, in the present case, the Fund is statutorily required under the WDCA to compensate Olsen for certain injuries. As stated by this Court in *Olsen III*, which the circuit court accepted:

> All of the cases cited by the [the Fund] . . . involve a third party not subject to the limitations of the WDCA. See *McLouth Steel Corp v A E Anderson Construction Corp.*, 48 Mich App 424; 210 NW2d 448 (1973) (owner of blast furnace involved in injury sought indemnity from employer in employee injury case); *Nanasi v General Motors Corp*, 56 Mich App 652; 224 NW2d 914 (1974) (owner of construction site where injury occurred sought indemnity from employer in employee injury case). . . [*Olsen III*, at slip op 4.]

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[1] At the time *Dale* was decided, the exclusive remedy provision was set forth in MCLA 411.4, and stated, in part, "the right to the recovery of compensation benefits, as herein provided, shall be the exclusive remedy against the employer." However, the exclusive remedy provision is now set forth in MCL 418.131(1), which states, in part, "[t]he right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort."

Unlike the instant case, the above cases involve a third party that could ask for equitable relief because it was not subject to the terms of the WDCA. See MCL 418.827 (delineating third-party claims allowed under the WDCA) and MCL 418.531 (allowing the Fund to file a third-party action under MCL 418.827). In the above cases, the actions were filed pursuant to MCL 418.827, which as discussed earlier, does not allow actions against employers subject to the WDCA. Thus, the Fund's reliance on *Dale, supra* is misiplaced.

The Fund, citing *Cooper v Auto Club Ins Ass'n*, 481 Mich 399; 751 NW2d 443 (2008), argues that recently our "Supreme Court held a common-law action is legally viable even when the parties are subject to a self contained statutory scheme." We are not persuaded by this argument. In *Cooper*, the Supreme Court addressed whether a plaintiff's common-law cause of action for fraud was subject to the one-year back rule of MCL 500.3145(1). *Id*. at 401. The Supreme Court determined that an action for fraud was not "'an action for recovery of personal protection benefits payable under [the no-fault act] for accidental bodily injury,'" *Id*. quoting MCL 500.3145 (brackets in opinion), but instead "an independent and distinct action for recovery of damages payable under the common law for losses incurred as the result of the insurer's fraudulent action." *Id*. The Supreme Court held that "a common-law action for fraud is not subject to the one-year back rule." *Id*.

Plainly, the action for fraud in *Cooper, supra*, was not akin to an action for indemnity in the instant case. As noted by *Cooper, supra*, actions for fraud against no-fault insurers were not contemplated under the no-fault act. However, actions for indemnity or reimbursement against third parties are contemplated under the WDCA. The WDCA simply does not allow the Fund to be reimbursed for an employer's negligence. Thus, the Fund failed to show that its claim for indemnity is distinct from action "concerning compensation or other benefits" under the WDCA.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly